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82-689
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

HOMER N. COMEAU, ET UX.,
Petitioners,

vs.

CITY OF BROOKSIDE VILLAGE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

1. Whether the ordinances of the City of Brookside prohibiting the location of manufactured housing on any site other than "mobile home parks" deprives Petitioners of the Fourteenth Amendment's right to acquire, enjoy, own and dispose of property.

2. Whether Ordinance No. 58 of the City of Brookside deprives Petitioners of due process and equal protection of the Fourteenth Amendment in that it does not bear a substantial relationship to public health, safety or general welfare but rather is arbitrary, unreasonable and irrationale.

3. Whether the National Manufactured Housing Construction and Safety Standards Act, 42 USC §5403 preempts state regulation of manufactured housing with respect to the construction and installation of manufactured housing.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Homer N. Comeau, et ux, through the undersigned attorney, petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Texas Supreme Court is attached as App. A. The decision of the Texas Court of Civil Appeals is attached as App. B. The order overruling Petitioners' Motion for Rehearing is attached as App. C. The opinion of the state district court is not reported.

JURISDICTION

The judgment of the Texas Supreme Court (App. B) was entered on May 19, 1982. A petition for rehearing was denied on June 30, 1982 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The opinion of the Supreme Court of Texas considered discussed and denied the questions raised herein b petitioners.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. §5403(d) provides

in relevant part:

> "Whenever a Federal mobile home construction and safety standard established under this title is in effect, no State or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any mobile home covered, any standard regarding construction or safety applicable to the same aspect of performance of such mobile home which is not identical to the Federal mobile home construction and safety standard." 42 U.S.C. §5403(d)(1974).

The Texas Manufactured Housing Standards Act states:

> "A political subdivision of this state, without the express approval of the department following a hearing on the matter, may not adopt different standards from those promulgated by the department for the construction or installation of manufactured housing within the political subdivision." TEX.REV.CIV. STAT.ANN. art. 5221f, (Supp. 1981).

STATEMENT

The Constitutionality of two ordinances of the City of Brookside Village are presented herein. Petitioners

own a four (4) acre lot in City of Brookside Village on which a store, icehouse and storage sheds are located. In July 1978, Petitioners made request to the city council that they be allowed to move a manufactured house on the premises to be used as their residence. This request was refused by the city council on the basis of City Ordinances 58 and 78 which define mobile homes and prohibit their use as a residence outside of a "mobile home park". These ordinances are the City's only zoning provisions, i.e., there is no comprehensive zoning plan but rather this single, isolated incident of spot zoning. The body of this writ reports the reasons advanced by the City to justify these ordinances.

REASONS FOR GRANTING THE PETITION

1. This is not a zoning case. It is not a case where the proposed use is less than the "highest and best". No contention has been raised that the property cannot be used for a single family residence. This is a simple case of discriminatory state action, under the guise of zoning, directed against citizens who purchase manufactured housing. The *use* of the land is not changed merely because the Petitioners have chosen a manufactured, single family home rather than one built on site. This is a situation where citizens who purchased homes constructed under stringent, federal regulations are being denied the right to reside in the area of their choice for no valid reason. This represents the imposition of the long disgraced reasoning of the "separate but equal" theory to federally protected rights of

citizens to acquire, enjoy, own and dispose of property. This case involves the denial, by state action, of a citizen's ability to place a manufactured home on a particular lot *only* because it is a manufactured home. To place the matter in context, a brief history of manufactured history is provided.

The "trailer houses" of the 1930's and 1940's were the forerunners of today's manufactured homes. These trailer houses were often used by transient workers and were frequently placed in overcrowded, poorly maintained camps. In 1940, the Bureau of the Census categorized trailer houses with railroad cars, tents and shacks as a category of housing. Although these units provided much needed housing for defense and military construction workers during World War II, the owners and occupants were sometimes referred to as "trailer trash". In the 1960's, the evolution continued, and many of these dwellings became known as "mobile homes" because of their large size and more permanent use. The 1970 census noted that mobile homes had become a significant part of the nation's housing. In 1974, Congress passed the National Mobile Home Construction and Safety Standards Act, and on June 15, 1976, the Department of Housing and Urban Development began enforcement of a mandatory federal building code for the construction of mobile homes. This Act preempted state and local regulation of mobile home construction by prohibiting any standards which were not identical to those promulgated by HUD. By 1980, mobile homes had evolved into dwellings which ranged in size from 400 to 2,000 square

feet and were being constructed in one, two and three sections, many of which were being permanently attached to realty. In recognition of these facts and that a very small percentage of mobile homes were ever moved from their original homesite, Congress changed the statutory name to "manufactured homes".

Modern manufactured housing is available in a wide range of sizes, colors, styles and prices. All possible amminities are available just as in site-built structures. The same kinds and types of conventional mortgage financing are also available for manufactured homes.

The evolution of the industry, however, has not been matched by public perception. Attitudes formed decades ago about "trailer houses" persist today. As a result, manufactured housing often is zoned into "trailer parks" or "mobile home parks" and prohibited within all other residential areas.

The preamble of the Fair Housing Act of 1968 provides:

> "It is the policy of the United States to provide, within constitutional limitations, for fair housing through the United States."

The National Manufactured Home Construction and Safety Standards Act provides a stringent building code to insure the structural integrity of manufactured housing.

These congressional mandates for fair housing practices and quality construction of manufactured housing provide little assistance to those families who, fortunate enough to be able to realize the American dream, find themselves zoned out of traditional

residential areas and neighborhoods, and relocated to "mobile home parks" simply because the shelter they choose, or can afford, is manufactured housing. Federal building codes insure equality of construction between site built homes and manufactured housing, and to permit states' to treat the latter differently simply because it is constructed in a factory away from the homesite and has, to some, an antiquated stigma, requires the reasoning of *Plessy v. Ferguson*, 163 U.S. 537, 16 Sup.Ct. 1138, 41 L.Ed. 256 (1896) where the Court discussed the "separate but equal" theory in this manner:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and

that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals . . ."

The ordinance of the City of Brookside requiring manufactured housing to be placed only in "mobile home parks" is suspect for the same reasons *Plessy*, supra, was discredited in *Brown v. Board of Education*, 347 U.S. 483, 74 Sup.Ct. 868, 98 L.Ed. 873 (1954). To argue that the purchase of the manufactured housing was the choice which decided the location in which one would reside is to adopt the *Plessy*, supra, position that the badge of inferiority following from enforced separation existed solely because the colored race choose to place that construction upon it.

The *Brown*, supra, considerations concerning the importance of education are no less compelling than those concerning a family's home. The home and the neighborhood are recognized as primary environmental factors affecting young children and have a substantial impact on the emotional and psychological development of the child. A family's choice of neighborhoods may be based on one or more of numerous facts, such as proximity of schools or churches, location in relation

to the office or jobsite, proximity of relatives, nearness of shopping centers, etc. The choice of the neighborhood is, after affordability considerations, the primary decision affecting single family residential purchases.

It is not the position of Petitioner that "mobile home parks" are undesirable or unattractive. Many mobile home parks and communities are attractive, well appointed and offer a superior life style for the residents. However, the residents of mobile home parks are — and will forever remain — tenants, subject to the rules and regulations of the management or ownership which, of course, can change from time to time. It is the position of Petitioner that forcing a family to involuntarily reside in such a park as a result of a manufactured home is violative of the Fourteenth Amendment for the same reasons that "separate but equal" educational opportunities were struck down in *Brown*, supra.

The rationale that the Constitution does not provide a guarantee of access to dwellings of a particular quality, *Lindsey v. Normet*, 405 U.S. 56 (1972) is distinguishable as the instant case deals with the use of a citizen's own property.

2.a. The validity of an ordinance must turn on the circumstances of each case and the character of the regulations involved. Bound by this principle, the facts of this case, as evidenced by the record, must be applied by this Court to the legal issues to determine whether the ordinances are valid and constitutional.

The Court must, therefore, address the issue of whether an ordinance that is not part of a comprehen-

sive zoning plan, but which attempts to exclude all mobile homes except those located on rented or leased space in mobile home parks, bears a *substantial relation* to the public health, safety, morals or general welfare. A statutory discrimination must be based on differences that are reasonably related to the purposes of the act in which it is found. See *Morey v. Doud*, 354 U.S. 457 (1957).

As Petitioners have graphically illustrated hereinabove, there is no evidence in the record to reflect that *any* relationship exists between these ordinances and the protection of the public health, safety, morals or general welfare. The reasons alleged by Respondent's witnesses for the enactment and enforcement of the ordinances, i.e., "concern for lack of sewage, the lack of supply of water, the lack of protection of the fire department" (Louis Boehm, S.F. 51), all fail when applied to the actual facts of the situation existing in Brookside Village. Such "reasons" seem especially unfounded when the evidence reveals that no studies were performed, no experts solicited and no committees formed to review or evaluate the problems prior to the enactment of the ordinances.

The conditions the Respondents seek to remedy in the public interest commonly relate to all types of structures in the community. To discriminate selectively against manufactured homes — against a particular type of construction — under the guise of police power neither cures the alleged problem nor provides equal protection to its citizens.

The City alleges a potential health problem con-

cerning the density of septic tank systems; however, the problem is undisputedly one which involves the density of septic tank installations connected to all structures within the City. Prohibiting manufactured homes has *no* relationship to any solution to the problem; the solution is in regulation of the number of residences, or businesses, which can be constructed or used. In other words, the *type* of structure has no relationship to the septic tank installation as *any* structure would require a septic tank since no city sewer system has been provided.

Further, there are limits on a municipality's exercise of its police power, separate and apart from the substantial relationship test. Certainly, no ordinance can be arbitrary, capricious and/or unreasonable. An ordinance that is based on bias or prejudice must fail this test. The record shows that the City of Brookside Village has only enacted *one* zoning regulation — that being the one in question which excludes mobile homes from being located in the City except in mobile home parks. This Court should recognize how ludicrous this becomes then the City ordinances will allow the Petitioners to place a business or commercial venture (including a high density, high rise apartment complex) on their property, but will not allow them to use that same land for a single family residence — if the residence is a manufactured home. This unconscionable result occurs even though the home is affixed to a permanent foundation, sits on four (4) acres of land, meets all construction, building and safety codes and standards, and provides a safe, durable, single family

home at a moderate price.

Petitioners submit that the City of Brookside Village has acted in an arbitrary, capricious and unreasonable manner in attempting to exclude all mobile homes from being located on privately owned (as opposed to rented or leased) property. This action can only be explained by bias and prejudice.

Petitioners would again point to those cases which have defined the constitutional limits which are placed on a municipality's use of its police power. In *Village of Euclid v. Ambler Realty Co.*, supra, the court stated the issue as follows: "Is the ordinance invalid in that it violates the constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police powers, which are unreasonable and confiscatory'?" *Id.* at 386.

The Supreme Court of Texas in *Spann v. City of Dallas* defined the police power as a grant of authority from the people to the government for the protection of the health, safety and welfare of the public. 235 S.W.2d 513 (Tex. 1921). "The police power is funded in public necessity, and only public necessity can justify its exercise." *Id.* at 515. The Court stated in regard to the validity of such ordinances that:

> "Since the right of the citizen to use his property as he chooses so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers

> or threatens the public health, the public safety, comfort or welfare. A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating advantages." *Id.* at 515.

The Texas Supreme Court, in *Lombardo v. City of Dallas,* supra, again stated that the police power is subordinate to the right to use property as the owner chooses unless such use endangers the public health, safety, or welfare. Again, Respondents ask the Court, where, after close scrutiny of the facts, is the substantial relation between these ordinances and a valid exercise of the police power?

Of the cases cited in the Court's opinion, only one was directly on point as to the facts and issues germane to this case. In *Robinson Township v. Knoll,* 410 Mich. 293, 302 N.W.2d 146 (1981), the Michigan Supreme Court held that a per se regulation prohibiting mobile homes from residential zones other than mobile home parks is unconstitutional.

The Court framed the issue in the case as follows: "...do mobile homes differ from other single family dwellings in any constitutionally cognizable manner which would justify their per se classification as a different use? If not, then the ordinance limiting mobile

homes to mobile home parks has 'no reasonable basis for its existence'." After examining the same public health, safety moral and welfare considerations present in this case, the Michigan Court held that there was no reasonable basis.

The understanding that the Michigan court had for the circumstances at bar is best stated in the summation of its opinion:

> "This is not to say that a municipality must permit all mobile homes, regardless of size, appearance, quality of manufacture or manner of installation on the site, to be placed wherever site-built single family homes have been built or are permitted to be built. Nor do we hold that a municipality may no longer provide for mobile home parks. We hold only that a per se restriction is invalid; if a particular mobile home is excluded from areas other than mobile home parks, it must be because it fails to satisfy standards designed to assure that the home will compare favorably with other housing that would be allowed on that site, and *not merely because it is a mobile home." (Emphasis added)*

This statement succinctly sets forth the position of Petitioners that their home should be regulated in the same manner as all single family residences.

However, the Supreme Court of Texas has refused to consider *Robinson Township* favorably and has cited other cases as standing for more persuasive authority.

Therefore, this antiquated, prejudicial viewpoint mandates a review of these cases to point out the distinctions.

The cases cited by the Supreme Court of Texas were decisions involving ordinances enacted pursuant to comprehensive zoning plans. Brookside Village, as previously stated, does not have such a plan. Further, virtually all of these cases are pre-1976 and do not, in fact could not, consider the federal mandates involved in the construction of manufactured housing since that date. See *Robinson Township v. Knoll*, supra.

Thus, a review of the only two cases decided after HUD-code regulations went into effect in June 1976 best illustrate the inapplicability of the type of case relied upon by the Supreme Court of Texas as authority. In *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 586 P.2d 860 (1978), the appellate court held, in an appeal from Summary Judgment, that: (1) the findings of fact and conclusions of law entered by the trial court were superfluous and could not be considered; and (2) the Court's review was limited to considering only uncontroverted facts developed by the pleadings or by factual concessions. Thus, no facts were before the Court upon which it could make a decision as to whether there was a substantial relationship between the public health, safety, morals and welfare and the municipality's exercise of its police power.

Even if *Duckworth* could have reached the merits, a major fact differentiates it from the instant case. The City of Bonney Lake had a comprehensive zoning

ordinance and it *did not exclude* all mobile homes. The court in *Duckworth* stated:

> "As with every new use, mobile homes must be provided for. But, any provision made must be by zoning regulations designed to fit the community's *total* need. We are also cognizant that increased mobile home use has developed in a climate of municipal and neighborhood hostility which originally impeded efforts to effect reasonable and rational accommodations between the mobile homes and more conventional residential uses..." (Emphasis added)

Likewise, the case of *Town of Stonewood v. Bell*, 270 S.E.2d 787 (W.Va. 1980), is not valid precedent for application in the instant case. *Town of Stonewood* is an appeal from a summary judgment and is based on the State of West Virginia's enabling statute (W.Va. Code §8-12-5(30)) which grants to every municipality the power "to prohibit with or without zoning the location of occupied house trailers or mobile homes in *certain* (emphasis added) residential areas". *Id*, at 789. Here, the court deferred to the state legislature's action and did not make a determination as to the constitutionality of the ordinance of the municipality.

By analogy, Petitioners point to the Supreme Court of Texas' decision in *Thompson v. City of Palestine*, 501 S.W.2d 579 (Tex. 1974). The Court stated as follows:

> "On the other hand, this court has condemned spot zoning, where a small area is singled out for different treatment from that accorded to similar surrounding land without any showing of justifiable changes in conditions . . . . We do not presume the validity of such spot zoning."

This case illustrates two points. First, a judicial abhorance to "spot zoning"; second, a judicial recognition of "justifiable changes in conditions". The ordinance in the instant case is equally as offensive to the first point as the one in the *Thompson* case, and the Texas Supreme Court in the cause at bar completely fails to recognize the substantial changes which have occurred in the evolution of manufactured housing.

Ordinance No. 78, as amending No. 58, is really not a land "use" regulation as pointed out hereinabove. It is an absolute prohibition of a particular type of structure for an approval use. However, if such were land use regulation, it would of necessity be a defacto zoning ordinance and would fail the "comprehensive" test required by Texas Statutes. The Texas Legislature has delegated "zoning powers" to cities pursuant to the Zoning Enabling Act (TEX.REV.CIV.STAT.ANN. art. 1011a-1011j). Art. 1011c of that statute requires that zoning ordinances *shall* be enacted pursuant to a comprehensive zoning plan (emphasis added). The City of Brookside Village has no comprehensive zoning plan, thus Ordinance No. 78 is void because in contravention of the specific requirements of this statute.

b. Petitioners have been denied equal protection of law guaranteed by the Texas and Federal Constitutions, and the Texas Supreme Court erred in not striking down the ordinance as applied to Petitioners' single family residence.

The instant issue relates to this Court's command that analysis of unconstitutional discrimination must "never be confined to historic notion of equality". *Harper v. Virginia Board of Elections*, 383 U.S. 663 at 669 (1966). Equality issues must be determined with the present and future in mind.

Equal protection requires rationality in the nature of the class singled out. *Rinaldi v. Yeager*, 384 U.S. 305 (1966). "The courts must reach and determine the question whether the classifications drawn . . . are reasonable in light of its purpose . . . " *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). There must be a legitimate public purpose and the means chosen must fit the ends.

The only potential public purpose served by Ordinance No. 78 is to avoid the possible risk of fire in mobile homes constructed prior to the HUD code and possibly to "protect property values". (Petitioners rely on their other points of error and the undisputed record to show that mobile homes have no water or sewage characteristics different from any other residence.)

If the public purpose goal of the ordinance were to decrease fire risks, then an ordinance could have been drawn to fit the goal by (1) requiring substantial spacing between all structures and requiring water wells to have reasonable capacity for firefighting

capability; or (2) prohibiting all residential structures (including mobile homes) unless they met certain required fire prevention standards. As drawn, Ordinance No. 78 totally fails to meet or fulfill such a public purpose goal.

If the goal of the ordinance is to "protect property values", the ordinance could be drawn to fit the goal by (1) requiring minimum lot sizes for all structures with appropriate off-set and set-back requirements; (2) requiring all structures to be built with certain kinds or types of exterior siding materials, roofing, etc.; or (3) developing a comprehensive zoning plan for multiple types of residential, commercial and industrial use areas within the City. Some courts have recognized as a "legitimate function of zoning" the concern of cities wanting to stabilize property values and insure that a pre-existing use does not lose its value by some incompatible use on adjacent property. These cases involved cities which had adopted comprehensive zoning plans, or which had well defined areas of use and development. *Eastlands, Inc. v. Floyd County,* 244 Ga. 761, 262 S.E.2d 51 (1979).

The case at bar is a glaring example of a city that has *no* plan for stabilized property values because it has no zoning plans other than the "single-shot" ordinance before this Court. Petitioners strongly urge that the City of Brookside Village has absolutely no legitimate concern over "protecting property values" in the way it has drawn its one and only zoning ordinance. The record shows that Petitioners' land is already used in a commercial manner with a store and ice house thereon.

Respondents' four acres do not adjoin a settled residential neighborhood of homogenous site built structures. There is virtually no development near Petitioners' land. Petitioners' home is a quality built, federally approved, 3 bedroom, 2 bath home, inspected to assure compliance with federal construction standards, of approximately 1,780 square feet, which is affixed to a permanent foundation, attached to real estate and cared for as any other new home. Petitioners plan to build a two-car garage and porch adjoining the home.

The record contains no evidence that the City of Brookside Village has any stabilized property values to maintain. On the contrary, the record shows that the City of Brookside Village has taken no steps to stabilize property values. Therefore, Ordinance No. 78 wholly fails the equal protection test if "protecting property values" is the alleged public purpose goal. The means chosen do not fit the ends. There is no stable community, no thought out plan, no established property values to protect.

Just as it is well settled that the judiciary will not needlessly infringe upon the legislative functions of government, it is also well settled that legislation which burdens fundamental rights or suggests prejudice will be subject to strict scrutiny by the courts. As Justice Stone state in *United States v. Carolene Products Co.*:

> ". . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of

> those political processes ordinarily to be relied upon to protect minorities, and which may be a call for a correspondingly more searching judicial inquiry . . . ." 304 U.S. 144 at 152-53 n.4 (1938).

A court that is too timid to draw a realistic line of demarcation between the legislative and judicial functions abdicates its role as defender of the Constitution, and therefore unleashes the will of the majority upon the poor, the unpopular, the minority and the less fortunate.

A review of the record shows a strong bias against any mobile home in the mind of the Mayor of the City of Brookside Village as he was quoted in a local paper:

> "If they try to move a mobile home next to my house . . . I'll burn it down and you can quote me on that." (S.F. 43).

This is the same individual who condemned mobile homes as "eyesores" per se but had trouble differentiating between mobile homes and site-built structures in photographs. He also admitted that many site-built homes are eyesores.

Despite "presumptions", "inferences" and "prejudices" which are argued in favor of this Ordinance, this Court's duty is to place this zoning ordinance next to the provisions of the United States Constitution relating to due process and equal protection for analysis. If Ordinance No. 78 as amending Ordinance No. 58, casts a shadow over these applicable Constitutional provi-

sions, this Court must strike down the offensive provisions of the Ordinance.

Petitioners appear before this Court with the request that they be granted equal protection under the law. Professor Laurence H. Tribe states the inherent problem with the following simple notion of equal protection:

> "Neither in theory nor in operation, however, can a norm of equality be given real context without imposing significant constraints upon the substantive choices that political majorities and their representatives might feel strongly inclined to make." *American Constitutional Law* §16-1 (1978).

As the Oregon Supreme Court stated ten years ago:

> "At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life:
>
> It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial,

> or judicial in character. To place them in the hands of legislative bodies . . . is to open the door completely to arbitrary government." *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 at 26 (Wash. 1972).

The Texas Supreme Court abdicated its duty of judicial review when it stated: "An adjudication of t' e appropriate measure of regulation of mobile homes constructed in conformance with federal and state standards is the prerogative of local and state governing bodies." This is an unconscionable position. Local legislatures cannot be allowed to thwart the intent of federal and state legislation in connection with a matter as important to the public interest as safe, durable and affordable housing.

The record shows that the City of Brookside Village made no studies and utilized no engineers or other expert consultants before banning mobile homes from private property locations. Such unreasonable, arbitrary and capricious action is blatant endorsement of majoritarian domination. Ordinances are passed by a majority of the members of City Councils. Members of City Councils are elected by majority vote of the people who reside within the city limits. People cannot reside within the city limits of Brookside Village if they want to place a manufactured home permanently on their own real estate. There is only one mobile home park in Brookside Village. So, the offending ordinance will not change through the local legislative process because the

discrete and insular minority of mobile home owners who want to affix their homes permanently to their own real estate cannot ever vote out the very people whose prejudice create the ordinance under review.

The Texas Supreme Court stated that it is aligning itself with the majority of other jurisdictions in its holding. Petitioners respectfully disagree and suggest that a more accurate analysis of the May 19, 1982 Texas Supreme Court Opinion shows that the Court aligned itself only with the historical prejudices of the past to the detriment of the constitutional guarantees of Petitioners and other similarly situated landowners. The trend since the 1970's has been towards a more realistic view of local governments and the parties in interest, with a shift towards more sophisticated and creative judicial review. N. Williams, Jr., *American Land Planning Law*, Chap. 5 (1974 and 1981 Supp.).

The Texas Supreme Court erred in concluding: "Because all mobile home owners, desiring to use their structures as residences, are treated alike under Ordinance No. 78, no denial of equal protection is present". Petitioners respectfully submit that the Court completely missed any reasonable classification. The Texas Supreme Court's classification begs the question, just as courts prior to *Brown vs. Board of Education*, 347 U.S. 483 (1954) may have reasoned: "Because all black people desiring to ride the bus are treated alike by the ordinance requiring them to sit at the back, no denial of equal protection is present".

Although mobile home owners may not yet be a "suspect classification", this Court should recognize

that they do comprise a "discrete and insular minority" which suffers due to the prejudice of the majority. *United States v. Carolene Products Co.*, supra.

Equal protection guarantees will be hollow and empty if, when left in the hands of the local majority, the judiciary draws its line of judicial deference too narrowly. The proper classification test for an ordinance in a city without a comprehensive zoning plan is whether it treats all landowners alike and only restrict use which, in fact, cause harm to the adjoining property. If this Court feels the record contains facts sufficient to sustain some classification regarding use by mobile homes, let that classification be based on a rational basis (non-HUD-code constructed mobile homes restricted to parks; HUD-code constructed mobile homes on a permanent foundation not so restricted). But the classification should not sentence all mobile home owners to life as a tenant of a mobile home park. The ordinance before the Court is unconstitutional on its face and in its execution as to Petitioners.

3. As the Texas Courts have noted, an ordinance which conflicts or is inconsistent with state legislation is impermissible. *Jere Dairy, Inc. v. City of Mt. Pleasant*, 417 S.W.2d 872 (Tex.Civ.App.-Texarkana 1967, writ ref'd. n.r.e.). However, the Texas Supreme Court obviously felt that the ordinances of Brookside Village were "ancillary to and in harmony with the general scope and purpose of the state enactment", and thus were not pre-empted by the state and federal statutes.

A close examination of the ordinances, as synopsed by their respective preambles, will show they *are* in conflict with state and federal statutes. The preamble to Ordinance No. 58 states:

> "An ordinance of Brookside Village, Texas, for the purpose of regulating the construction, operation and maintenance of mobile home parks in the village of Brookside; requiring a construction permit for the construction, alteration or extension of mobile home parks and providing for inspections and fees; requiring a license for the operation of a mobile home park and providing for inspections and fees; requiring that an annual, a semi-annual or a temporary parking permit be obtained for any mobile home or travel trailer occupying a stand in a mobile home park and providing for inspections and fees; providing for appeals; establishing standards for the construction, operation and maintenance of mobile home parks; providing that owners or operators of existing mobile home parks shall be permitted a period of time as herein provided to operate a mobile home park without obtaining a license; regulating mobile homes and travel trailers outside of mobile home parks; containing a repealing clause and a severability clause; containing a penalty provision and providing an effective date."

and to Ordinance No. 78:

> An ordinance amending Ordinance No. 58; regulating the parking of mobile homes; regulating the change or replacement of mobile homes; providing for emergency use of mobile homes; requiring permits for such emergency use; providing for a penalty for violation hereof; and providing for an effective date hereof."

The stated purposes of both of these ordinances is to regulate the construction, inspection and installation of mobile homes. A review of the state and federal statutes clearly indicates that such regulation is now exclusively within the purview of these bodies politic.

The National Manufactured Housing Construction and Safety Standards Act states:

> "Whenever a Federal mobile home construction and safety standard established under this title is in effect, no State or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any mobile home covered, any standard regarding construction or safety applicable to the same aspect of performance of such mobile home which is not identical to the Federal mobile home construction and safety standard." 42 U.S.C. §5403(d)(1974).

The Texas Manufactured Housing Standards Act states:

> "A political subdivision of this state, without the express approval of the department following a hearing on the matter, may not adopt different standards from those promulgated by the department for the construction or installation of manufactured housing within the political subdivision." TEX.REV.CIV.-STAT.ANN. art. 5221f, (Supp. 1981).

Thus the state and federal governments have pre-empted local municipalities with reference to the public health, safety and welfare as such relate to fire safety, windstorm resistence, and value of the mobile home due to appearance and external siding and roofing materials. The City of Brookside Village is left *only* with the regulation of the connection of the home to local utilities, or to private water and septic systems, and the spacing and density of the homes. All of the alleged public purpose goals of this City have been pre-empted.

Drawing specific attention to the language of the state statute it must be noted that the City of Brookside Village has *never* requested or received permission to vary their standards from those of the State of Texas. (Testimony of Louis Boehm, S.F. 54) The language of both statutes is plain and unequivocal — there can be no variance from the state and federal standards. Surely, the state and federal legislatures did not intend nor contemplate that municipalities could evade the preemption of the construction standards by excluding manufactured housing. The ordinances of Brookside

Village are at variance with these statutes, and therefore, must, by the exact language of both statutes be pre-empted.

It seems only logical that the state and federal governments after years of research, examination, study and public hearings would require a political subdivision such as Brookside Village to conform to their mandates. Cities such as Brookside Village must not be allowed to continue to enforce these discriminatory ordinances, which were enacted with no research and no study, in direct contravention of the express requirements of both legislatures.

To paraphrase the Texas Supreme Court's own citation, a general law and a city ordinance will be held repugnant to each other if no reasonable construction upholding both can be reached. *City of Beaumont v. Jones,* 560 S.W.2d 910, 911 (Tex.Civ.App.-Beaumont 1977, writ ref'd. n.r.e.). In the instant case, the evidence is clear — the alleged purposes and goals for which Ordinance No. 78 were enacted have been pre-empted by the State of Texas and the United States.

CONCLUSION

The Petitioners request that their writ of certiorari should be granted.

Respectfully submitted,

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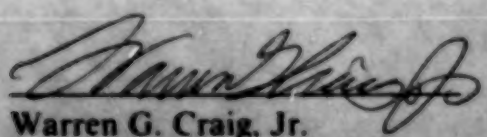
ATTORNEY FOR PETITIONER

September 27, 1982

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 1982, a copy of Petitioners' Writ of Certiorari was served on Respondents' counsel, William E. Kuhlmann, 3616 Preston Road, Pasadena, Texas 77505 by depositing same, properly addressed, in a United States Post Office, with first-class postage prepaid.



Warren G. Craig, Jr.